In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1219

PHILLIP SANTORO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 388 F. 2d 113.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1967. A petition for rehearing was denied on February 9, 1968. The petition for a writ of certiorari was filed on March 11, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297-585—68

QUESTIONS PRESENTED

1. Whether petitioner's motion to suppress all government evidence on the ground of alleged wiretapping should have been sustained.

2. Whether the trial court adequately instructed the jury that post-arrest statements by petitioner's co-defendants were admissible only against the declarant.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to transport stolen automobiles in interstate commerce and of substantive offenses involving the transportation and sale thereof, in violation of 18 U.S.C. 371, 2312 and 2313. He was sentenced to imprisonment for fifteen years (R. 2–6, 92, 108). The court of appeals affirmed.

During a period from early April through July 1963, six Cadillac cars were stolen from various places in the Chicago area and thereafter sold in the vicinity of San Francisco.

In April 1963, petitioner's co-defendant, Mrs. Dorothy Haynes, sold two of the Cadillacs to a dealer in Oakland. The title to one of these cars was in the name of Phillip Cassar, whom she had described as an automobile dealer in Chicago (Tr. 336–345). About six weeks later, Mrs. Haynes returned to this dealer with petitioner, who gave the name of Phillip Cassar, and they sold him a Cadillac bearing Illinois license tags (Tr. 345–349).

On June 3, 1963, petitioner, again using the name of Phillip Cassar, accompanied by Mrs. Haynes, sold another one of the Cadillacs to a San Francisco dealer. Petitioner kept the Illinois license plates (Tr. 355–365). When Mrs. Haynes returned several weeks later, offering another Cadillac for sale, the dealer thought that he recognized the license plates and started to make a call to the Auto Theft Bureau. As he did so, Mrs. Haynes drove away (Tr. 366–367, 371–375).

On July 3, 1963, Mrs. Haynes sold a Cadillac to a Stockton dealer, taking a check therefor payable to Phillip Cassar, whom she described as an elderly Chicago resident (Tr. 383–385, 390–398, 403). On July 19, 1963, petitioner and two co-defendants who had assisted in transporting the vehicles from Illinois, tried to sell two Cadillacs to this same dealer. Their arrest followed (Tr. 404–416, 431, 438–440, 457–458, 492–493). At that time petitioner produced as identification two credit cards and a driver's license, all in the name of Ralph Sieben (Tr. 156–157, 963-973).

Ralph Sieben, of Chicago, Illinois, testified to the theft of his Cadillac from O'Hare Airport at Chicago, in June 1963. He identified the two credit cards in petitioner's possession at the time of his arrest as having been in the glove compartment of the stolen car (Tr. 151–157). The driver's license in Sieben's name which petitioner had in his possession when he was arrested was false (Tr. 156, 963–973).

The vehicle identification numbers on all the vehicles in question had been falsified prior to sale (Tr. 288–301).

Petitioner, when he took the stand, admitted his connection with the sale of the cars. He said they were sold by him as agent for a "Ralph", a casual acquaintance in Chicago (Tr. 711–796).

ARGUMENT

1. On an earlier indictment for the offense here charged, petitioner moved to suppress evidence allegedly obtained by illegal wiretapping. In support of the motion, petitioner submitted affidavits of himself and a Mrs. Moreno that, shortly after his arrest in California, petitioner telephoned Mrs. Moreno in Chicago and told her to water the plants and to be sure to throw out the garbage. He said that F.B.I. agents had thereafter questioned both Mrs. Moreno and himself as to the meaning of this conversation. On January 27, 1964, after hearing oral argument, Judge Halbert continued the matter to February 7, 1964, directing the parties to produce such witnesses as they deemed appropriate for a full consideration of the motion. No witnesses were produced, counsel for petitioner later explaining that this was due to the cost of bringing witnesses from Chicago to California. After the present superseding indictment was returned, petitioner filed a similar motion to suppress, which was heard by Judge MacBride (Tr. 12–13, 37–39). On argument of the motion, the following colloquy took place with regard to Judge Halbert's ruling (Tr. 46):

> The COURT. Well, I know he wouldn't consider it on affidavits, and I don't think I am going to consider it on affidavits either, but

what he has said that if you want a hearing to determine whether there is some factual evidence upon which you can justifiably claim wire tapping, he gave you the opportunity to present that evidence.

Mr. GOLDSTEIN [petitioner's attorney]. Yes, sir, he gave us the opportunity to bring witnesses from Chicago.

The COURT. Very frankly, that is just about what I am going to do.

Petitioner's counsel did not indicate any desire to have such a hearing. The court denied the motion, but without prejudice to petitioner's right to renew it at the time of trial (Tr. 46–59; 1 R. 120).

On the day before trial, petitioner's counsel asked Judge Halbert to hear the motion. The judge expressed surprise that the motion was being brought up at that time, but said that he would rule the following morning. At that time, he overruled the motion but stated that it was without prejudice to renewal during trial (Tr. 81–95, 100–102). At the conclusion of the government's evidence, petitioner's counsel, without producing evidence, moved to strike all the evidence "on the ground that it was unlawfully obtained because of proof of telephonic conversation". He offered to prove the telephone conversation, described above, adding to the previous account only the assertion that both petitioner and Mrs. Moreno had denied to the F.B.I. that the words used had any hidden meaning (Tr. 534–536). The motion was overruled (Tr. 538–541, 554–555).

Petitioner was not denied a hearing on his motion; he failed to make use of the opportunities available both before and during trial to obtain a hearing. If the testimony of Mrs. Moreno was necessary to petitioner's defense and he was financially unable to bring her from Chicago, her presence could have been obtained at government expense. Rule 17(b), F. R. Crim. P. Petitioner's reliance upon *Hoffa* v. *United States*, 387 U.S. 231, and *Kolod* v. *United States*, 390 U.S. 136, is misplaced, since there the government admitted that illegal electronic surveillance had occurred. Here the government did not admit and petitioner did not make any showing of illegal wiretapping.[1]

But at all events petitioner failed to make any showing that the allegedly overhead conversation was in any way relevant to the evidence at the trial. The conversation itself was never alluded to in the testimony and there was not even a suggestion as to how the conversation about flowers and garbage could possibly have led to trial evidence. There was clearly no occasion for the court to sustain petitioner's motion to strike all the government evidence upon the basis of petitioner's irrelevant affidavits.

2. When a post-arrest statement by the defendant Coduto was offered in evidence, the only objection made by counsel was that he had not been taken before a proper judicial officer. This objection was over-

[1] In accordance with the policy of disclosing to the courts instances in which there was illegal electronic surveillance by federal agents, we have determined that there is no information to disclose in this case.

ruled (Tr. 443–446). After the testimony as to the statement was introduced,[2] the court, *sua sponte*, gave the following instruction (Tr. 448):

> Now, ladies and gentlemen of the jury, I will on my own motion tell you that any statements made by one of these defendants after this alleged offense occurred is binding upon that defendant and that defendant alone. In other words, it is not binding upon the other defendants.

The court did not repeat this instruction after statements by other defendants were introduced,[3] but in its final charge, the court told the jury (Tr. 1045):

---

[2] Coduto stated that he had known Ralph Sieben, a bartender in Chicago, for about five months. Approximately two weeks before the interview Sieben had offered him $100 plus expenses to drive a car to California. On July 16 to 18 they and co-defendant LaMagna drove two Cadillacs to San Francisco. On the following day, petitioner obtained a third Cadillac from Mrs. Haynes and the three men drove all three cars to Stockton. During the course of the interview, it developed that Ralph Sieben was actually petitioner (Tr. 446–448).

[3] Co-defendant LaMagna gave an account similar to that of Coduto. He said that he knew petitioner only as "Ralph" (Tr. 460–461). In a later interview he added an account of two previous trips which he had made with petitioner in which Cadillacs were taken to California and sold (Tr. 471–472). These statements were reduced to writing and placed in evidence (Tr. 473–474).

Co-defendant Haynes told the interviewer that on July 19, 1963, a man by the name of Joe had driven her to Stockton in her 1957 Cadillac, and a man named Pete had driven a 1963 Cadillac convertible. She had waited on a street corner while the sale was made (Tr. 507). When asked as to an earlier transaction involving a white Cadillac convertible, she said that this had been given to her for sale by one Phillip Cassar, who had signed the papers over to her. She had used the name of "June

> No act or declaration of a conspirator which is committed or made after the conspiracy has been terminated, for instance by its purpose having been fully accomplished or by its objective having ended is binding upon his co-conspirators and they are not criminally liable for any such acts or declarations. * * *

Petitioner now complains that the court should have given a limiting instruction after the testimony as to the statements of LaMagna and Haynes, but no such request was made by counsel at trial. In view of the simple and comprehensive language which the court used in its initial instruction, that "any statement" by one of these defendants was binding upon him alone, which was repeated for emphasis, the jury could not have been misled. Certainly, in view of the lack of request for repetition of an instruction which had expressly been made applicable to the statements of all the defendants, there was no error. Moreover, the issue was again covered in the final charge.[4] In view of the clear nature of the proof of petitioner's guilt, reinforced by his own testimony identifying himself as having participated in the transportation and sale of these vehicles under an assumed name, there was no ground for reversal. *Calhoun* v. *United States,* 368 F. 2d 59 (C.A. 9).

Johnson" in wiring the proceeds of the sale to Cassar, because that was the name of Cassar's aunt and she wanted to save him any embarrassment, as he was a married man (Tr. 508). She gave vague answers to the question whether she knew a man by the name of Phillip Santoro (Tr. 509).

[4] Petitioner contends that the effect of the final instruction was nullified by another portion of the charge (Tr. 1029):

"Except in the case of the offense of conspiracy, the charge

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

APRIL 1968.

---

in Count 1 of the Indictment an admission or incriminatory statement made outside of Court by one defendant may not be considered as evidence against any other defendant not present when the statement was made."

This instruction, given in a completely different portion of the charge, was appropriate to inform the jury as to the proper scope to be given to statements or representations, such as to petitioner's identity, which were made in the absence of the other defendants. It was a correct statement of the law. *Lutwak* v. *United States*, 344 U.S. 604, 617–619. Cf. Mathes & Devitt, *Federal Jury Practice and Instructions*, §§ 19.10, 25.06, 80.09 (1965).

U.S. GOVERNMENT PRINTING OFFICE: 1968